2002

Fairbourn Commercial v. American Housing Partners : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

FAIRBOURN COMMERCIAL, INC., a Utah corporation, Plaintiff and Appellee, vs. AMERICAN HOUSING PARTNERS, INC., a Delaware corporation, Defendant and Appellant.	:	CIVIL NO. 20020060-CA PRIORITY NO. 15

APPEAL FROM THE JUDGMENT OF THE HONORABLE RONALD E. NEHRING, THIRD DISTRICT COURT ENTERED NOVEMBER 28, 2001

REPLY BRIEF OF APPELLANT

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I. FAIRBOURN HAS FAILED TO RESPOND TO NUMEROUS LEGAL ARGUMENTS OF AMERICAN HOUSING ALLOWING THIS COURT TO INFER THAT THE LAW IS AS CITED IN AMERICAN'S BRIEF.

In its brief, Plaintiff and Appellee Fairbourn Commercial, Inc. ("Fairbourn") failed to respond to numerous legal arguments of Defendant and Appellant American Housing Partners, Inc. ("American"). This Court may therefore treat Fairbourn's failure to respond as an acknowledgment of the arguments in American's initial Brief and "indulge a strong inference that the law is as cited and argued by appellant's counsel." Fitzgerald v. Salt Lake County, 22 Utah 2d 128, 130, 449 P. 2d 653, 654 (1969).

In its initial brief, American raised three arguments to which Fairbourn did not respond in its opposition brief. First, American argued that there was no meeting of the minds between American and Rochelle Properties, L.C. ("Rochelle") regarding the Purchase Agreement. (Brief of Appellant at pages 28-32.) Second, American argued that the trial court erred in admission of parol evidence that contradicted the plain language of the Purchase Agreement. (Brief of Appellant at pages 33-36.) Third, American argued that the trial court had failed to hold Fairbourn to the standard of a fiduciary with relation to American and denying Fairbourn's claims based on its breach of such duties. (Brief of Appellant at pages 52-55.) Each of these arguments provides an independent basis mandating judgment in favor of American in this dispute.

Because Fairbourn failed to respond to any of these arguments in its brief, pursuant to Fitzgerald v. Salt Lake County, this Court may indulge a strong inference that the law regarding these three issues is as cited and argued by American in its initial brief in this matter.

II. AMERICAN HAS MET ITS DUTY TO MARSHAL EVIDENCE IN THIS MATTER.

Fairbourn's initial argument in its brief is that American failed to meet the marshaling requirement regarding issues of fact required under Utah law. (Brief of Appellee at pages 11-12.) However, Fairbourn does not note any specific items of evidence not marshaled by American but rather merely makes the bald statement that American failed to meet its duty. (Brief of Appellee at pages 11-12.) This Court has previously ruled that it "will not consider conclusory arguments without citations to either the record or cases involving pivotal issues." Marchant v. Park City, 771 P. 2d 677, 682 (Utah Ct. App. 1989). As Fairbourn has failed to cite the record regarding evidence not marshaled by American, this Court should not consider Fairbourn's conclusory statement. The Utah Supreme Court has also stated that a reviewing court "is not simply a depository in which a party may dump the burden of argument and research. . .[and] a reviewing court will not address arguments that are not adequately briefed." Ellis v. Swenson, 2000 UT 101 ¶ 17, 16 P. 3d 1233 (citations omitted).

Furthermore, contrary to Fairbourn's conclusory argument, American did meet its duty to marshal the evidence noting every scrap of competent evidence

introduced at trial and viewing the same in the light most favorable to the trial court's construction. (Brief of Appellant at pages 28-31 and 38-43.)

In its opposition brief, Fairbourn set forth its own statement of the facts claiming that American failed to "adequately marshal all the evidence." (Brief of Appellee at pages 1-9.) After review of Fairbourn's statement of the facts, which are largely taken from the trial court's findings of fact in this matter, the only material difference from American's initial Brief is that Fairbourn raises the issue that American was motivated to terminate the Purchase Agreement with Rochelle by the subsequent sale of the Property to Leon Peterson ("Mr. Peterson"). However, the trial court definitively ruled during trial that the subsequent Peterson transaction was not a factor motivating American to terminate the Purchase Agreement with Rochelle and was therefore irrelevant. (T. 493-94.) Counsel for Fairbourn also conceded that Fairbourn was unable to prove that American contacted Mr. Peterson before terminating the Purchase Agreement with Rochelle. (T. 493.) This concession and the trial court ruling occurred during Fairbourn's counsel's argument that American had terminated the Purchase Agreement with Rochelle in bad faith as follows:

> MR. SABIN: No, what he [Mr. Alvarez on behalf of American] does and what we think the evidence is showing is that by the time he gets to the point of having the Rochelle Property put away -- and as he testified, he -- we haven't been able to prove that he had talked to Peterson before the Peterson -- you know, before the Rochelle contract was terminated. But he did know a lot about Peterson, had some dealings with Peterson, his agent knew a lot about Peterson, he

knew what was going on in there and he did a market. That's Item No. 1.
THE COURT: You are missing the obvious thing: That talking to Peterson -- as far as I'm concerned, he didn't know that Peterson was available before this deal was done, and the reason, as far as I'm concerned that that has been established conclusively, is that you had an opportunity to provide strong evidence on that, and I haven't heard from Mr. Peterson.
MR. SABIN: Well -- yeah.
THE COURT: (Inaudible).
MR. SABIN: And then (Inaudible) --
THE COURT: If there's one guy that could have shed a lot of light on that.
MR. SABIN: Okay.
THE COURT: He never showed up. As far as I am concerned, that issue is a dead issue.

(T. 493-94.)

American has met its duty to marshal evidence in this matter. Fairbourn has failed to cite the record regarding any competent evidence that American has failed to marshal and its arguments should not be considered by this Court. The only evidence that Fairbourn appears to be arguing was not marshaled pertains to arguments the trial court found to be baseless and irrelevant. (T. 493-94.)

III. FAIRBOURN PROPOSES THE WRONG STANDARD OF REVIEW REGARDING THE ISSUES ON APPEAL.

In its brief, Fairbourn raises an incorrect standard of review regarding the issues on appeal. (Brief of Appellee pages 12-13.) Fairbourn argues that because there was a bench trial at which evidence was received, the trial court is entitled to deference regarding all its rulings. (Brief of Appellee pages 12-13.) Such a simplistic approach to the standard of review in the appellate process is not

supported by the numerous rulings regarding standards of review on appeal by the Utah Supreme Court and the Utah Court of Appeals. See Jackson, Utah Standards of Appellate Review - Revised, 12 - OCT Utah B.J. 8 (1999).

American has raised eight issues on appeal. (Brief of Appellant at pages 7-9.) Five of the issues are questions of law that the appellate court accords the trial court's interpretation no presumption of correctness. (Brief of Appellant at pages 7-9, 20, 33, 36, 49, and 51.) Two of the issues are questions of fact that the appellate court will not set aside the trial court's rulings unless clearly erroneous. (Brief of Appellant at pages 7-8, 28-29, and 38.) One issue is a mixed question of fact and law that is ruled "de novo" by the appellate court with a grant of discretion to the trial court. (Brief of Appellant at pages 9 and 52-53.) Fairbourn's argument that because there was a trial all issues on appeal are granted deference to the trial court's ruling should be ignored, and the issue-by-issue standard of review as set forth in American's brief should be followed in the appellate review of this matter.

IV. ROCHELLE WAS NOT A READY, WILLING AND ABLE BUYER.

Fairbourn argues in its brief that Winkelman v. Allen, 214 Kan. 22, 519 P.2d 1377 (Kan. 1974) and Shell Oil Co. v. Kapler, 235 Minn. 292, 50 N.W.2d 707 (1951) do not support the arguments raised in American's initial brief. However, contrary to Fairbourn's assertions, both cases do support American's position, with the long quotation from Shell included by Fairbourn in its brief merely reiterating American's arguments in this matter. (Brief of Appellee at pages 21-23.) Following Fairbourn's

quotation from Shell, the Minnesota Supreme Court goes on to further clarify what is required for a proposed buyer to be financially "able" when relying on loans to be lent by a third party as follows:

> Generally speaking, a purchaser is financially ready and able to buy: (1) If he has the needed cash in hand, or (2) if he is personally possessed of assets — which in part may consist of the property to be purchased — and a credit rating which enable him with reasonable certainty to command the requisite funds at the required time, or (3) if he has definitely arranged to raise the necessary money — or as much thereof as he is unable to supply personally — by obtaining a binding commitment for a loan to him for that purpose by a financially able third party, irrespective of whether such loan be secured in part by the property to be purchased. Although no precise line of demarcation between the application of the second and third divisions of the above rule can be laid down for all cases, it is clear — in the light of the purpose of this rule — that where the purchaser relies primarily, not upon his own personal assets, but upon the proceeds of a contemplated loan or loans to be made to him by a third party, he is financially able to buy only if he has a definite and binding commitment from such third party loaner.

Shell at 712-13 (emphasis added).

Fairbourn further argues that Winkelman stands for the minority position that a proposed buyer is financially "able" only if it has cash on hand. (Brief of Appellees at page 22.) However, Winkelman stands for the proposition that if a proposed buyer does not have cash on hand, he is still financially "able" if "he is able to command the necessary funds to complete the purchase within the time allowed." Winkelman at 1384. The Supreme Court of Kansas further ruled that a "purchaser cannot show [financial] ability by depending upon third persons in no way bound to furnish the funds" and that a proposed buyer "is financially able to buy only if he has

a definite and binding commitment from such third party loaner." Id. at 1384-85 (citations omitted). Also, in Shell, the Supreme Court of Minnesota held that a proposed buyer relying on third-party funds without a binding third-party commitment "could not establish with reasonable certainty his ability to buy" the subject property. Shell at 713.

Though Fairbourn is correct in that the individual facts in each case are relevant in determining whether a proposed buyer is financially able and a broker is entitled to commission for producing a ready, willing and able buyer, courts across the country consistently hold that a proposed buyer who is relying on funds to purchase the property from a third party is not financially able unless such third party is contractually bound to produce such funds. The string of citations on page 23 of Fairbourn's brief support this majority rule. Sticht v. Shull, 543 So.2d 395 (Fla. App. 4th Dist. 1989) (Broker not entitled to commission for producing a financially "able" buyer where the buyer planned on obtaining purchase funds from his mother, but the mother was under no contractual commitment to provide funds either to sellers or prospective buyer); Telander v. Posejpal, 418 N.E.2d 444 (Ill. App. Ct. 2d Dist. 1981) (Broker not entitled to commission for procuring financially "able" buyer where real estate purchase contract was contingent upon proposed buyer obtaining financing and proposed buyer was unable to obtain binding commitment for loan of purchase funds from third party within time frame required by financing contingency clause of purchase contract); Record Realty, Inc. v. Hull, 552 P.2d 191

(Wash. Ct. App. 1976) (Broker not entitled to commission for producing a financially "able" buyer where proposed buyer had not applied for or obtained a binding loan commitment from a financially able third party for funds to purchase the subject property); Peter M. Chalik & Assoc. v. Hermes, 201 N.W.2d 514 (Wis. 1972) (Broker not entitled to commission for producing financially "able" buyer where proposed buyer was dependent upon third parties to obtain purchase funds who were in no way bound to furnish the funds to the proposed buyer).

The only case cited by Fairbourn arguably supporting its position (that a proposed buyer relying on third-party funds need not have a binding commitment from such third party to be deemed financially "able") is Scott v. Carvaack, 372 N.E.2d 1375 (Ohio Ct. App., Hamilton County 1977) which is easily distinguished from the case at hand. In Scott, the appellate court held that though the proposed buyer did not have a binding commitment from the third-party funding the purchase, the proposed buyer was financially "able" based on evidence that the lender subsequently lent funds to the proposed buyer on similar property and the lender also testified that it would have lent funds to the proposed buyer within the time frame required by the subject purchase contract. Scott at 1377-78. Fairbourn did not present any such evidence of its financial capability in this action.

Fairbourn also quotes an ALR 4th annotation at length to highlight that those courts requiring a financially "able" buyer to have cash in hand are in a minority position. (Brief of Appellee at page 22.) The next paragraph in the ALR 4th

annotation after Fairbourn's quote proceeds to clarify the majority position, which is the position proposed by American, that if a potential buyer does not have cash on hand, it must have a binding commitment to receive the funds from a third party. The subsequent paragraph in ALR 4th annotation reads as follows:

> The courts which have not required the purchaser to have the cash in hand to be considered financially able have also stated that such ability is established if the purchaser has secured a binding commitment to receive the funds from a third person. They have also stated the converse of this proposition, that a purchaser dependent on uncommitted parties for funds is not financially able to make the purchase, precluding a broker from taking a commission. The most popular view of the meaning of "financial capability," among those courts holding that a prospective purchaser is not required to have the cash in hand to make the purchase in order to be financially able, embraces all of the views stated by those courts. This view is that financial ability is the ability to command the resources to complete the purchase according to the terms of the sales contract.

Annotation, What Constitutes Financial Ability to Perform Within Rule Entitling Broker to Commission for Producing Ready, Willing, and Able Purchaser of Real Property, 87 A.L.R. 4th 21 (1991) (emphasis added) (citations omitted).

It is also of interest to note that Fairbourn fails to address the controlling Utah case regarding this issue, Sproul v. Parks, 116 Utah 368, 210 P.2d 436 (Utah 1949). As noted in American's initial Brief, the Utah Supreme Court has already ruled that a financially "able" buyer "does not mean a purchaser who will not be ready for some time." Id. at 438. (Brief of Appellant at pages 24-25.) Fairbourn's failure to present its interpretation of Utah case law regarding this issue demonstrates that such case law supports American's arguments in this case as

set forth in American's initial Brief on pages 24 and 25. Rochelle was not a financially "able" buyer consistent with the majority opinion regarding a broker seeking compensation for procuring a buyer that is ready, willing and able and consistent with Utah law as set forth by the Utah Supreme Court in Sproul.

V. FAIRBOURN'S ARGUMENTS REGARDING INTERPRETATION OF THE FINANCIAL CLAUSE OF THE PURCHASE AGREEMENT ARE MISLEADING AND UNPERSUASIVE.

In making its arguments regarding the interpretation of the financial capability clause of the Purchase Agreement between American and Rochelle, Fairbourn makes several arguments that are misleading and relies on incorrect statements of fact. (Brief of Appellee pages 13-20.) Fairbourn's arguments are therefore unpersuasive and should not be followed by this Court.

A. The Ambiguity of the Purchase Agreement Is a Question of Law.

Fairbourn's arguments in its brief regarding the interpretation of financial capability clause of the Purchase Agreement (contained in Paragraph 3 of the Counter-Offer which was incorporated into the final Purchase Agreement attached as Addendum "B" to American's initial Brief, hereinafter this paragraph shall be referred to as "Paragraph 3") ignores that the initial inquiry made by the trial court regarding the ambiguity of the Purchase Agreement is a question of law that is reviewed without deference to the trial court by this Court on appeal. (Brief of Appellee pages 13-20.) As argued in American's initial Brief, the trial court's determination that the Purchase Agreement is ambiguous is a conclusion of law

that should be overturned on appeal without deference to the trial court's ruling. (Brief of Appellant pages 20-23.)

B. Fairbourn Has Shortened the Language of Paragraph 3 to Make it Appear Ambiguous.

In its brief, Fairbourn argues that even if Paragraph 3 is not ambiguous, Rochelle fulfilled its duties set forth in the plain language of Paragraph 3. (Brief of Appellee at page 16.) However, in making such argument, Fairbourn argues that Paragraph 3 simply requires "evidence of financial ability." (Brief of Appellee at page 16.) Fairbourn's quote taken from Paragraph 3 is incomplete and renders Paragraph 3 ambiguous. Paragraph 3 states in its entirety:

> Within Fourteen days after execution of this Agreement by both parties, buyer shall supply to seller with evidence of financial capability to close on the Property within the time frame reference above.

(R. 410, Ex. No. 5; Addendum "B" attached to Brief of Appellant.)

As argued in American's initial brief, there are three elements required by the plain language of Paragraph 3: (1) within fourteen days of execution of the Agreement; (2) Rochelle is required to supply American; (3) with evidence of its financial capability to close on the Property by paying $2,277,000 within fourteen days of final plat plan approval. (Brief of Appellant at pages 22-23.) Fairbourn is correct in that Rochelle only provided some "evidence of financial capability" within fourteen (14) days of the execution of the Purchase Agreement. What Rochelle failed to provide American is "evidence of financial ability to close on the Property"

as the plain language of Paragraph 3 requires. Rochelle has therefore failed to fulfill the duties required by the plain language of Paragraph 3 of the Purchase Agreement. American therefore terminated the Purchase Agreement in good faith and Fairbourn is not entitled to commission in this matter.

C. Fairbourn Fails to Argue Any Alternative Definition of Paragraph 3.

In its brief, Fairbourn does not raise any alternative definition of Paragraph 3. Rather, it makes the same arguments it did before the trial court which rewrites Paragraph 3 rather than shows an alternative meaning of its language.

The trial court held in this matter that paragraph 3 is ambiguous because it "gives no guidance either to the quantity or quality of evidence which Rochelle must provide to demonstrate financial capability." (R. 236 and Exhibit "A" attached to Brief of Appellant.) However, paragraph 3 does state the quantity or quality of the evidence by requiring that Rochelle provide "evidence of financial capability to close on the Property" within fourteen days after execution of the Purchase Agreement. This "financial capability to close" is the quantity and quality of proof that Rochelle had to provide American with fourteen days of execution of the Purchase Agreement. As argued above and in American's initial Brief, the letters provided by First Security Bank are not binding on First Security Bank and do not demonstrate Rochelle's ability to pay $2,277,000.00 to American which is the requirement to close the purchase of the Property.

As argued in American's initial Brief, by contending that the two non-binding First Security letters met the necessary proof of financial capability, Fairbourn necessarily argues that the "likelihood of future loan approval" is sufficient evidence of present (14 day) capability. (Brief of Appellant at pages 26-28.) By substitution of the terms "likelihood" or similar terms such as "probable" or "more likely than not" the trial court rewrote Paragraph 3 and nullified the plain and ordinary meaning of the parties' agreement. Fairbourn's failure to argue the alternative construction of Paragraph 3, as rewritten by the trial court, demonstrates that even Fairbourn, in good conscience, cannot argue that the plain language of Paragraph 3 means "probable" or "more likely than not." Paragraph 3 is not ambiguous as a matter of law and should be interpreted by this Court according to its plain language that Rochelle had to provide American evidence of its financial ability to close on the sale of the Property within fourteen days of execution of the Purchase Agreement.

D. The Peterson Contract Is Irrelevant Regarding American's Intent in Entering into the Purchase Agreement with Fairbourn.

American's contract with Mr. Peterson is irrelevant regarding American's intent in entering into the Purchase Agreement with Fairbourn. In its brief, Fairbourn argues that American was motivated to terminate the Purchase Agreement with Rochelle in order to sell the Property to Mr. Peterson and thereby make more money. (Brief of Appellee at pages 18-19.) Fairbourn also argues that the modified financial capability language contained in the contract selling the

Property to Mr. Peterson is evidence that American intended a different meaning regarding the financial capability clause in the Purchase Agreement with Rochelle. (Brief of Appellee at pages 19-20.)

The trial court ruled that the Peterson Contract was not contemplated at the time American terminated the Purchase Agreement with Rochelle and was therefore completely irrelevant in determining American's intent in terminating the Fairbourn Purchase Agreement. (T. 493-94.)

Furthermore, the modified language in the Peterson Contract clarifies American's intent in entering into the Purchase Agreement with Rochelle. American intended that the proof of financial capability to close that was to be provided by Rochelle within ten days of executing the Purchase Agreement was to be subject to American's approval. The new contract language does not demonstrate that American meant something different in the Purchase Agreement with Rochelle but rather clarifies American's intent when contracting with Rochelle.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this court reverse the judgment of the trial court and remand this matter to the trial court for calculation and award of Appellant's attorneys' fees and costs in successfully defending against Appellee's cause of action, both at trial and on appeal.

DATED this 11 day of October, 2002.

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MAILING CERTIFICATE

I hereby certify that I caused to be mailed, U.S. Mail, postage prepaid, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following this 11 day of October, 2002:

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